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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

19 Cr. 802 (GBD)

5 MENDEL ZILBERBERG,

6 Defendant.

7 -----x
8 New York, N.Y.
9 January 11, 2023
10:00 a.m.

10 Before:

11 HON. GEORGE B. DANIELS,

12 District Judge

13 APPEARANCES

14 DAMIAN WILLIAMS,

15 United States Attorney for the
Southern District of New York

16 BY: DINA McLEOD

DANIEL NESSIM

17 KIMBERLY RAVENER

Assistant United States Attorneys

18 BRAFMAN & ASSOCIATES PC

19 Attorneys for Defendant

20 BY: BENJAMIN BRAFMAN

JACOB KAPLAN

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(Case called)

MS. McLEOD: Good morning, your Honor. Dina McLeod, Daniel Nessim, and Kimberly Ravener on behalf of the government.

THE COURT: Good morning.

MR. BRAFMAN: Good morning, your Honor. Benjamin Brafman and Jacob Kaplan on behalf of Mr. Zilberberg, who is present, your Honor.

THE COURT: Let me start with the government. What's the status from the government's perspective?

MS. McLEOD: Your Honor, while I won't bury the lead, the basic status is that we understand from defense counsel that they are likely to seek an adjournment of the trial. The government produced a number of documents that were produced to us from the FDIC earlier in the case, which weren't central in the government's case, but out of an abundance of caution, we produced. Defense counsel, due to their trial schedule, is going to be available starting in around May. So that's sort of the main status right now. There's obviously other sort of substantive issues about the case, but in terms of sort of the top line issue for your Honor in terms of scheduling and dates, that is an application that we understand to be coming from the defense today.

THE COURT: Mr. Brafman, what's your situation?

MR. BRAFMAN: Your Honor, we or all, I think, on both

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1 sides are diligently preparing for trial beginning on the 23rd.
2 Yesterday, we received 20,000 documents, 20,000 pages of
3 documents that sensibly are related to the FDIC, and the FDIC
4 had a central role in the investigation in this case. The
5 charge was bank fraud and this began with substantial testimony
6 before the FDIC.

7 The week before or two weeks before, we received
8 11,000 documents, and getting 20,000 documents yesterday makes
9 it literally impossible for us to be able to carefully review
10 them. And whether or not the government deems them to be
11 relevant or not, we have an obligation, I think, to review them
12 carefully because the FDIC is not taking a side position here.
13 They have been central to the preparation of the case. So, in
14 an abundance of caution, I think we have no choice, subject to
15 your Honor's approval, to seek an adjournment.

16 The difficulty with adjourning the trial is we have
17 another trial beginning in late February before Judge Irizarry,
18 and that's been pending for three years. So that, I think,
19 trial date is firmly set. We were going to go to the Eastern
20 District to request a short adjournment of that date because of
21 this trial running back to back, but if we get this trial
22 adjourned, that trial won't have to be moved.

23 But the principal request, your Honor, is for this
24 trial to be adjourned. We've conferred with the government and
25 we believe, again, if you are available, sir, that the May date

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1 would be acceptable. The government also asked us whether we
2 would be available in July and the answer is yes as to both May
3 and July. I think your Honor knows it's rare that I ask for an
4 adjournment of a trial date. It's just what I do. And we
5 prepared diligently, but to get 20,000 documents -- and we're
6 not faulting the government. These documents were, I think,
7 accumulated by the FDIC, but they are a central player in this
8 case, and not to have a chance to review them, if there were a
9 conviction in this case, it would make it difficult for it to
10 be sustained if we didn't have a chance to review those
11 documents.

12 So, respectfully, your Honor, we are asking for an
13 adjournment. Subject to your Honor's availability, we would be
14 available in May or in July, which I think would be, both
15 dates, acceptable to at least some members of the government
16 team.

17 THE COURT: I already started lightening the calendar
18 for the 23rd of January for this trial. My understanding,
19 we're talking about approximately a three-week trial. Are we
20 definitely or very likely going to go to trial on the next
21 date?

22 MR. BRAFMAN: Well, Judge, my request is that it not
23 be a starting date because we will not have had a chance to
24 review these materials, even if we worked around the clock,
25 20,000 documents, and god only knows what they refer to and who

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1 they relate to. There are a number of FDIC witnesses who will
2 testify in this trial. Many of the interviews were done with
3 members of the FDIC present when witnesses were reviewed as
4 opposed to most cases where we get FDI 302s, we were getting
5 FDIC reports of the interviews. There are also a wealth of
6 testimony that was taken by the FDIC, and many of the principal
7 witnesses in this case testified under oath before the FDIC.
8 Now, we have had that testimony for a considerable period of
9 time, but getting 11,000 documents and now 20,000 documents, I
10 think it makes it impossible for us to provide effective
11 assistance of counsel if we had to ignore what was in those
12 materials and proceed to trial on the 23rd.

13 I apologize for this request, Judge, but I think you
14 should recognize, respectfully, that we are in an untenable
15 position because going to trial without reviewing those
16 materials would introduce an ineffective assistance of counsel
17 issue in the event that the defendant were convicted, and I
18 don't want that issue in any case I diligently prepare for.
19 But I think, Judge, it's an unfortunate development. I'm not
20 faulting anyone for this development, but I certainly don't
21 want us to be faulted for raising this issue on the eve of
22 trial.

23 THE COURT: At this point, there's no possibility or
24 likelihood of a disposition in this?

25 MR. BRAFMAN: I don't think so, your Honor. We have

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1 had that discussion numerous times. The defendant maintains
2 that he is not guilty. We have, I think, a reasonable, triable
3 case from our perspective. I think he's entitled to a trial,
4 obviously.

5 THE COURT: What week were you looking at either in
6 May or July?

7 MR. BRAFMAN: We had the opportunity to confer with
8 your courtroom deputy and we were looking for either mid May,
9 and then very recently before your Honor got on the bench, the
10 government asked whether we would be available in July, and I
11 think both dates would be acceptable.

12 THE COURT: And there's no other month or weeks that
13 are possible?

14 MR. BRAFMAN: Well, what we may do is, your Honor, if
15 your Honor would agree, we would later today look at our
16 respective calendars, confer with the government, and then send
17 a note to the Court as to what other dates might be acceptable.
18 I don't believe April is available because of the trial in the
19 Eastern District, and also the Passover holiday comes out right
20 in between.

21 THE COURT: I'd like to give you an earlier date
22 rather than a later date. May, I can just tell you right now,
23 I think I have a trial scheduled for May 15th already. Also,
24 last year, and I don't know if there's going to be a
25 possibility this year, I sat for a week on the Ninth Circuit,

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1 so I wasn't here for a week and I was in California. So I
2 don't know whether or not whether I'm going to be asked to come
3 back out there.

4 MR. BRAFMAN: Your Honor, may I suggest that if the
5 January 23rd date is adjourned by the Court, we can confer with
6 the government either later today or tomorrow, send your
7 Honor's deputy or your Honor a list of dates that we would be
8 available, we would waive speedy trial obviously because it's
9 our request, and then the Court could look at those dates and
10 give us another day at your Honor's convenience.

11 THE COURT: Why don't we do this, let me pick a date
12 that's convenient for the parties for a pretrial conference in
13 about 60 days. Between now and then, you can propose some
14 specific dates, as many as you can for two or three months in
15 those months, and I can check my schedule and see what makes
16 sense.

17 So we'll adjourn the trial. I would say maybe a
18 March 21st pretrial conference. We can see whether or not we
19 can firm up a trial date between now and then or on that date.

20 MR. BRAFMAN: I think March 21st is available to
21 defendant, your Honor.

22 THE COURT: At 10 o'clock.

23 MS. McLEOD: That's fine for the government.

24 THE COURT: Let's have a pretrial conference on that
25 date.

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1 In the next few weeks, give me some proposed dates for
2 trial. If I can respond quickly to you and make those dates
3 available, then I'll get back to you even before the March 21st
4 pretrial conference and we can either have that or adjourn that
5 if we don't need to meet at that time.

6 I know there's an outstanding motion. I was going to
7 be prepared to at least discuss that today. Did you want to
8 address that today or did you want to put that off until --

9 MS. McLEOD: I think the parties both wanted to
10 address it today.

11 THE COURT: My understanding, it was short circuited,
12 but my understanding with regard to the issues is that the
13 government has some evidence that they say is possibly 404(b)
14 evidence. My recollection of the papers is that the government
15 has three or four incidents that they wanted to use and the
16 defense has objected to one of those.

17 MR. BRAFMAN: That's correct, your Honor.

18 THE COURT: And I think the one that the defense
19 objected to is the financial transactions with the niece?

20 MR. BRAFMAN: Yes, sir.

21 THE COURT: I guess my direct question to the
22 government in reviewing the papers is that I understand --
23 well, two things. The government has at least two or three
24 incidents besides that that they want to offer, and those
25 incidents are more akin to, I'll say, the MO that the

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1 government contends is the pattern in this case. It seems to
2 me that, in one sense, this niece issue is cumulative of that
3 and that the niece issue is not the same MO as the other
4 instances that the government wants to offer at trial. I'm
5 trying to figure out if the government is going to offer two or
6 three other instances that they say is the same MO as they say
7 is the evidence in this case. What is the need for the niece
8 situation in addition, and why is that relevant if it's not the
9 same MO as the government contends is its case here and as it
10 contends is the situation in the other instances?

11 MS. McLEOD: So a couple things. So there is the
12 charged loan, which I think we defined as loan 1, and then
13 there are three other extensions of credit, there are various
14 types of extensions of credit, one of which is the niece. So,
15 in total, the government is seeking to introduce three in
16 addition to the charged loan.

17 THE COURT: I'm sorry. You just confused me because
18 you just gave me four. You said that there is one --

19 MS. McLEOD: There is the charged loan, which is 1.

20 THE COURT: When you say the charged loan --

21 MS. McLEOD: That is the one that is the subject of
22 the indictment.

23 THE COURT: The charges in this case?

24 MS. McLEOD: Yes.

25 THE COURT: And then three others.

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1 MS. McLEOD: And then three others, including the
2 niece.

3 THE COURT: So if you get two out of the three, why do
4 you need the niece and why is the niece's pattern and MO more
5 relevant or as relevant as the pattern and MO in the other two?

6 MS. McLEOD: So, first, as to the pattern, the MO is
7 very similar in all three in the sense that --

8 THE COURT: I didn't understand that the MO with the
9 niece was the same kind of structured transaction as the other
10 two and as is charged in this case.

11 MS. McLEOD: Well, they are all straw loans that the
12 defendant steered to Park Avenue Bank. He then facilitated and
13 controlled much of the transaction in the sense that he was the
14 person sort of mainly corresponding with the bank and sort of
15 pushing the loan through. In all of these transactions, he
16 failed to disclose his personal financial interest in the
17 proceeds of the loan. There were similar misstatements in all
18 three of the loans.

19 So, for example, in both loan 2, which is the niece
20 loan, they say that the purpose of the loan is working capital
21 for a business, which is false. Then, in another loan, I think
22 it's loan 3, they also state working capital for a business.
23 So the misstatements among the loan applications are almost
24 identical in terms of the false purpose of the loan.

25 THE COURT: But I thought that the other two loans

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1 were more -- the activity of the other two loans was similar to
2 the activity that you claim occurred in this case and that of
3 the three instances that the personal loan to the niece was not
4 structured in the same way as those other two loans and as the
5 charged loan.

6 MS. McLEOD: Well, they all have slightly different
7 structures to them, they're different types of loans. I mean
8 even --

9 THE COURT: I mean, you know more than I, but do you
10 not think that the other two loans are, as you've laid them out
11 in your papers, structured in a more similar way than the niece
12 loan?

13 MS. McLEOD: I wouldn't say they're structured in a
14 more similar way. I would say that they are more alike in
15 terms of time period --

16 THE COURT: Well, aren't they more alike in terms
17 of -- I mean, your theory of this case is what, that he got
18 together with a codefendant outside of the bank, they
19 structured false loans that would go to a company, and I don't
20 know if I have the facts as you claim them, and that paperwork
21 was done to transact that loan with this company and the loan
22 was approved. Mr. Zilberberg, being the bank officer, received
23 part of those proceeds. My understanding is that's what you
24 say similarly happened in these other two transactions, but
25 that's not exactly the way that you say the transaction with

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1 the niece took place.

2 MS. McLEOD: They have very similar relevant
3 characteristics. The key characteristics --

4 THE COURT: I'm talking more about the differences.

5 MS. McLEOD: Well, again, they all have slight
6 differences from each other.

7 THE COURT: Why do you need the niece transaction? If
8 you have two other transactions that you say are structured in
9 a way that, as I say, the same MO, structured in a way where
10 there's a phoney company, as you say, that's set up, that false
11 information is provided to the bank for this loan, the loan is
12 approved, and the defendant allegedly receives a portion of
13 those proceeds, that's not exactly what happened in the niece
14 loan. What I just said is not what happened in the niece loan,
15 is it?

16 MS. McLEOD: What happened in the niece loan is
17 that --

18 THE COURT: Answer that first. That's not the way the
19 niece loan was structured.

20 MS. McLEOD: In the sense that there weren't other
21 coconspirators involved.

22 THE COURT: In any sense, tell me in what way -- did I
23 mischaracterize the way this case and the other two loans were
24 structured? I mean, that's my understanding, what you
25 presented me.

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1 MS. McLEOD: I don't think so. I also think that --

2 THE COURT: But that's not the way the niece loan was
3 structured. First of all, did the niece loan involve setting
4 up a phoney company?

5 MS. McLEOD: So I don't think any of the loans involve
6 setting up a phoney company. The companies all existed and
7 they were legitimate. Actually, in some ways, that makes the
8 niece loan the most probative --

9 THE COURT: Why?

10 MS. McLEOD: Because in that case, in all of the other
11 cases, there were actual companies involved that were being
12 described as the companies that would receive the loan.

13 THE COURT: But the niece loan didn't involve a
14 company.

15 MS. McLEOD: But the representation to the bank was
16 that she had a business. So it's actually the most --

17 THE COURT: But it wasn't a business loan to the
18 company.

19 MS. McLEOD: No, but none of these were business
20 loans, they were all personal loans.

21 THE COURT: Okay.

22 MS. McLEOD: So they were all for working capital,
23 that was the purpose, but these were personal loans. So, for
24 example, loan 3 was a personal line of credit to the borrower
25 there. So the business versus personal distinction does not

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1 make --

2 THE COURT: So tell me what happened in the niece
3 loan.

4 MS. McLEOD: So with the niece loan, she --
5 essentially, the defendant told her, you know, there's a good
6 business opportunity for you, you can make some money, you just
7 open an account at Park Avenue Bank and I'll take care of it.
8 And she then signed a bunch of paperwork, which she didn't read
9 and didn't know really what was in it. As it turns out, it was
10 a loan which used her savings as the collateral for the loan,
11 which was a little over \$100,000. Those proceeds went to the
12 defendant. The misrepresentations in that loan paperwork were
13 frankly very clearcut. The niece is a --

14 THE COURT: Representations made by whom?

15 MS. McLEOD: The government would allege the defendant
16 because he prepared the paperwork.

17 THE COURT: Okay. That's what I'm trying to
18 understand.

19 So is it your position that the niece is a
20 coconspirator in a criminal transaction?

21 MS. McLEOD: No, because she did not know about the
22 representations. She didn't know false representations were
23 being made.

24 THE COURT: But in all other cases, that's not true?

25 MS. McLEOD: So in the charged loan, in that case, as

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1 well, that straw borrower also did not read the loan paperwork
2 and did not know --

3 THE COURT: What was Mr. Fried's role?

4 MS. McLEOD: Mr. Fried -- so one of the other straw
5 borrowers was Mr. Fried's father-in-law, so he was involved in
6 that loan. Actually, in that loan, as well, that straw
7 borrower didn't know either. So most of the loans, actually
8 out of the four, three of them involve straw borrowers that
9 didn't understand.

10 THE COURT: How many of those involved Mr. Fried?

11 MS. McLEOD: Two.

12 THE COURT: Okay. The other two, other than the
13 niece's transaction?

14 MS. McLEOD: No, that includes the charged loan. Out
15 of the three -- I'll call them three 404(b) loans versus the
16 charged loan. The charged loan involved Mr. Fried and one of
17 the three 404(b) loans involved Mr. --

18 THE COURT: So you have the charged loan which
19 involves Mr. Fried, you have the other loan, one of these other
20 three loans that involve Mr. Fried, and you have a loan
21 transaction that doesn't involve Mr. Fried. Why do you need
22 the niece?

23 MS. McLEOD: Two of them. So a couple of reasons.
24 One is that the representations on the niece loan are far more
25 probative because they are so clearcut in terms of the falsity.

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1 So this is going back to my point about the companies and the
2 working capital.

3 THE COURT: How is it more clearcut? I'm not sure
4 either the information was true or it was false. Either bank
5 fraud was committed or it was --

6 MS. McLEOD: I agree, but some things are much
7 clearer, and let me explain why. So the other three loans, the
8 claim was this is for working capital for companies. In most
9 of those cases, the companies existed, these were real
10 companies. In the niece's case, the claim was this was working
11 capital for a business. The niece is a special ed teacher, she
12 has no business, and what's another sort of really key point
13 that makes this loan incredibly probative is that Zilberberg
14 has a clear personal relationship with the niece. So there's
15 no question that he would have known that she did not have a
16 business. And she would testify, I trusted him and he took
17 care of all the paperwork. So in some ways, that makes it much
18 more probative of the other loans --

19 THE COURT: Probative of what?

20 MS. McLEOD: Of his state of mind and of his
21 knowledge --

22 THE COURT: You don't think you have sufficient
23 evidence in this case and in combination with two other
24 transactions that demonstrate, sufficiently, his state of mind?

25 MS. McLEOD: No, and part of it is because I expect

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1 that the defense is going to argue this is all Aaron Fried.
2 They're going to say Fried did all of this, he was involved in
3 these loans, he's the mastermind --

4 THE COURT: And your response would be Mr. Fried was
5 involved in the charged offense, Mr. Fried was also involved in
6 a second offense, and here's another third offense that
7 Mr. Fried had nothing to do with that we can demonstrate.

8 MS. McLEOD: Exactly, so --

9 THE COURT: Okay. All of that is without the niece.

10 MS. McLEOD: Well, the niece is the first one that the
11 defendant --

12 THE COURT: I'm saying if you don't use the niece, you
13 still have Mr. Fried involved in this transaction, you say you
14 have Mr. Fried involved in a second transaction, and you say
15 that if you can put it all on Fried, you have a third incident
16 where Mr. Fried is not even involved that you can demonstrate
17 that this defendant's criminal --

18 MS. McLEOD: Right. The fact we have an extra one,
19 another one doesn't make the niece cumulative.

20 THE COURT: The question still is whether or not -- I
21 mean, if you tell me you have three things to prove the same
22 issue, I'm not sure it's not cumulative, and I'm not sure that
23 the personal relationship between interjecting the personal
24 relationship between the defendant and the niece is not more
25 prejudicial or confusing than it is probative. You have all

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1 sorts of other probative evidence.

2 MS. McLEOD: So I'm happy to respond to the
3 prejudicial point, but if I could respond to the relevance
4 point first.

5 I just want to take a 30,000-foot view here. So the
6 government's allegations are going to be that the defendant had
7 a calculated plan. He needed money, he was on the board of his
8 bank and he knew the way the bank worked, and over a course of,
9 frankly, a very short period of time, about a year, he steered
10 four straw loans to the bank that he knew he was going to be a
11 beneficiary of, but did not disclose that to the board, despite
12 there being regulations about that. Those loans had very
13 similar misstatements about what they were going to be used
14 for, the purpose of the loan. We expect that the defense is
15 going to, in part, say, you know what, look, he may have
16 received some of this money, but that was because he was being
17 paid for legal fees and Fried was the one who was handling all
18 of the representations. So all of this, you can't pin this on
19 him, he just didn't know.

20 THE COURT: And your response is, he did it at least
21 two times before?

22 MS. McLEOD: Yes.

23 THE COURT: But you want to say he did it at least
24 three times before.

25 MS. McLEOD: Twice, the niece puts the lie to that.

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1 The niece puts the lie to that because --

2 THE COURT: So does the other instances you're talking
3 about, don't they?

4 MS. McLEOD: Well, there's one other that doesn't --
5 there's one that involves Fried, Fried's father-in-law, and
6 then there's the charged loan, which also involves Fried.

7 THE COURT: And the one that doesn't involve Fried,
8 why is that not just as probative, if not more probative than
9 the niece's?

10 MS. McLEOD: Because that involves a client of the
11 defendant who was seeking a line of credit, a personal line of
12 credit for his own business. That business existed and he
13 received some of the funds, and some of the funds from this
14 line of credit went to his business and some went to the
15 defendant. So the question of what working capital is in terms
16 of legal fees is murkier, a little bit murkier on that
17 question, right.

18 So I think the government's argument would be you
19 received money from this loan and you knew that these
20 misstatements were false. But that was my point about the
21 niece being more clearcut. When you have a business and some
22 of the money is going to the business and some is going to pay
23 legal fees for your attorney, that's not as clear as a case
24 where you'd have a niece that the niece will say he did all of
25 this, he takes all of the money from this loan, which the niece

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1 doesn't even really realize that was what was happening. The
2 statements are about things that the defendant, I think the
3 jury can reasonably infer, would have known, I think this niece
4 can testify, he knew I didn't have a business, I'm a special
5 needs teacher. So the intent and the knowledge are much
6 clearer than the third case. So that's one of the reasons
7 they're not cumulative.

8 THE COURT: I'm not sure, I just don't have enough of
9 the facts. I'm not sure why you say it's much clearer than the
10 others.

11 MS. McLEOD: So I think what might be helpful, I
12 think, and I think it's helpful to have this conversation
13 because I have a sense of what you're attuned to in terms of
14 the factual nature of it. I think because it's so specific,
15 maybe it would make sense for us to put in a letter where we
16 describe in much more detail the differences between the loans,
17 because it sounds like that is understandably an important
18 point for you, and if that's not crystal clear, then I want to
19 make sure that it is.

20 THE COURT: My concern is this, if you have evidence
21 in this case, you have evidence of another transaction that you
22 say is similarly criminal that Mr. Fried was a coconspirator
23 and you have another transaction where Mr. Fried's not even
24 involved, I don't know why the niece is a critical part of your
25 case here. And there's a basic old rule that used to be

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1 followed that, as they say, if you can't win this case without
2 that, then maybe you shouldn't have brought this case. If the
3 niece's evidence is the critical piece of this case, what you
4 just described is if you do present it the way you presented
5 it, the jury is going to be faced with proof beyond a
6 reasonable doubt that the defendant was involved in this
7 transaction with Mr. Fried, proof that he was involved in a
8 previous transaction, similar transaction with Mr. Fried if he
9 claims no criminal intent. Then if he claims, well, I didn't
10 do it, Mr. Fried did it all, you say you have another case
11 where Mr. Fried is not even involved that you can show to rebut
12 that evidence. And I'm not sure that the jury needs to spend
13 their time trying to figure out whether the -- I assume that
14 you don't have any conviction of anyone with regard to the
15 niece's transaction?

16 MS. McLEOD: Correct.

17 THE COURT: So I'm not sure why it's worth the jury's
18 time and attention, and it's not more prejudicial for them, on
19 top of the evidence that you have in this case, on top of the
20 similar evidence that you have involving Mr. Fried, in light of
21 the similar evidence you have that doesn't involve Mr. Fried,
22 that they should spend their time making a determination of
23 whether or not he and the niece defrauded the bank and whether
24 or not that is significantly probative of whether he committed
25 this crime.

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1 MS. McLEOD: So, first of all, to the point about the
2 jury's time, this will be a relatively short trial and this
3 will be one witness, right, it's just the niece, she's maybe
4 30 minutes, she's got two documents. This is not going to be a
5 circus around this one person.

6 THE COURT: You're going to guarantee me that?

7 MS. McLEOD: Look, I don't know what Mr. Brafman is
8 going to do.

9 THE COURT: You're not even sure what you're going to
10 be compelled to do, that's the question.

11 MS. McLEOD: Look, I think, again, to sort of take a
12 step back, as you mentioned, the government has the burden of
13 proof here and this is a case where the intent and knowledge
14 are the key issues in the case. What did the defendant know,
15 what did he intend to do. And it's a fraud case, so a lot of
16 the argument is going to be circumstantial. So these are cases
17 where every piece of evidence that the government can bring to
18 bear, especially -- and again, I'm happy to put in a letter to
19 sort of explain, but exactly why the niece in particular is so
20 probative, but to have an example of a case where the defendant
21 and the defendant alone was the person who knew what was
22 happening and was in charge of it.

23 THE COURT: But you have that case without the niece.

24 MS. McLEOD: So, respectfully, I don't think we do,
25 and that's why --

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1 THE COURT: Because you just said to me that Mr. Fried
2 is not involved in one of these prior instances that you want
3 to put in evidence --

4 MS. McLEOD: I guess what I'm suggesting to you is
5 that the involvement of Mr. Fried is just one of the important
6 points about the loans.

7 THE COURT: But on that point, that point seems to be
8 that you already have evidence to rebut that argument.

9 MS. McLEOD: Perhaps as to that point. But again, in
10 the case with the niece, there is really no question that he --
11 frankly, the argument is extremely compelling, that he knew
12 what the misrepresentation was because this is his niece and he
13 knows that she doesn't have a business, she's a special ed
14 teacher. His client, he has a business, he's going to say,
15 look, of course he had a business, I thought it was for the
16 business, it wasn't my business what he was doing paying me
17 with the money, I didn't tell him to do that. That's very
18 different from the niece where he was the controlling person
19 behind it and he -- the evidence, again, the argument is, I
20 think, very compelling that there's no way he didn't know.

21 THE COURT: You don't think the argument is very
22 compelling with the evidence you have of this case independent
23 of that, the evidence that comes with the extra Fried
24 transaction and the evidence that comes with the non-Fried
25 transaction?

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1 MS. McLEOD: Well, I mean, of course, as the
2 government, you hope your evidence is compelling. We got to
3 put --

4 THE COURT: That's why I'm trying to understand why
5 you need this additional transaction and what is it that you
6 cannot -- you think you might not sufficiently be able to
7 demonstrate by having the evidence in this case, the evidence
8 of a prior transaction between these two coconspirators, and
9 the evidence of a prior transaction without Mr. Fried.

10 MS. McLEOD: I mean, if the Court's concern is the
11 number of transactions, and then that's a question of
12 choosing -- if it's sort of the Court would only like us to put
13 on only two 404(b) loans, then we can pick one or the other,
14 then we're happy to --

15 THE COURT: No, that's not my concern. My concern is
16 that you want to put on three, they've objected to one. My
17 concern is that the personal nature of the third transaction is
18 significantly different than the nature of the other
19 transaction. I'm not sure, again, other than, as they say, the
20 MO, I'm not sure what else that you want to argue additionally
21 and demonstrate additionally with the niece's transaction that
22 you don't have sufficient evidence and don't intend to offer
23 sufficient evidence without the niece's transaction. The way
24 you tell me as so, there's not a significant difference, I
25 understand the compelling part of your argument about the

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1 nature of her position and the relationship, but I am coupling
2 that with my assessment of whether or not this personal
3 relationship with the niece raises other issues for the jury
4 and may have some prejudice in this case that the other
5 independent transactions, if they are powerful evidence of MO,
6 then I assume your position is that you could probably, I
7 assume, I hope that the government's position is that you could
8 probably prove this case even without any of these prior
9 situations because you have sufficient evidence that indicates
10 that the defendant has committed this crime, the sufficient
11 involvement and knowledge to commit this crime. This isn't a
12 case where the government says that I need some similar act
13 evidence and, Judge, if you don't give us this, we won't have
14 any similar act evidence.

15 MS. McLEOD: So a couple points. One, I think your
16 Honor is right about sort of the -- I think you're attuned to
17 the issue sort of about personal nature. The personal nature
18 of the relationship is part of what makes it so probative. So
19 the fact that this is somebody who he knew so well is part of
20 what makes it probative. Part of it is not just the fact that
21 he would have had knowledge of her profession and the fact that
22 she didn't have a business and pushed the loan through knowing
23 she didn't have a business and that that was false, right, but
24 it's also the fact that the defendant, in doing this, had to
25 take advantage of trust relationships with lots of people.

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1 THE COURT: Right.

2 MS. McLEOD: And that's a big part of, you know, I
3 think what's going to be the narrative of the government's case
4 that --

5 THE COURT: I'm not sure the nature of the trust
6 relationship is significantly different for the charged offense
7 and the other two similar acts --

8 MS. McLEOD: And that's exactly why it's not more
9 inflammatory. So if the trust relationship isn't more
10 different than the charged loan, then certainly that --

11 THE COURT: My statement was about the other two, it
12 wasn't about the niece loan.

13 MS. McLEOD: Right. Maybe I just misunderstood.

14 THE COURT: I'm saying that the nature of the charge
15 here and the nature of the evidence with regard to the two
16 instances that they're not objecting to addresses that issue.

17 MS. McLEOD: In at least one of those loans, there was
18 taking advantage of a family member, it was just the
19 defendant's coconspirator who did it. These aren't sort of
20 situations where it's so far afield from what this is about.

21 And the other thing I would sort of note is the
22 general allegations. I mean, it's a criminal trial, so the
23 allegations are going to be the defendant did bad things,
24 right. The question is whether it's unfairly prejudicial to
25 him. So the government's case is going to be about this is

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1 somebody who was on the board of directors of a bank, had a
2 fiduciary duty to the bank, betrayed the trust of the bank and
3 bilked it out of a lot of money while the bank was at its
4 lowest point right before the bank went under, he was getting
5 money out the door just as the bank was about to fail.

6 THE COURT: And the question is you want to prove that
7 by the direct evidence in this case and evidence of three
8 different transactions as opposed to prove that by the evidence
9 in this case and the evidence of two transactions.

10 MS. McLEOD: My point about the narrative of the case
11 was more to the 403 point, that the allegations in this case
12 are alleging things that the defendant did that are bad because
13 that is what a criminal trial is about. However, the question
14 is, is that unfairly prejudicial to him and is it worse than
15 anything that is going to be before the jury for direct
16 evidence. What I'm saying is the evidence is going to be that
17 he did very, very bad things. And the fact that --

18 THE COURT: Well, it is prejudicial to the defendant.
19 If it wasn't prejudicial to the defendant, you wouldn't be
20 offering it.

21 MS. McLEOD: Exactly.

22 THE COURT: The question is, is a third transaction
23 unduly prejudicial to the defendant as opposed to a second
24 transaction, as opposed to a fifth transaction, as opposed to a
25 tenth transaction. I will give you an opportunity to submit a

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1 further letter on this understanding what my concerns are, but
2 it seems to me that my reaction at this point and not
3 necessarily my ruling at this point, but my reaction is that it
4 seems to me that it would be, in fairness, appropriate for the
5 government to put in its evidence on this case and put in two
6 separate, different transactions that they say that would rebut
7 any claim of mistake or lack of knowledge or lack of intent and
8 wait and see if the defendant testifies in this case to see
9 whether or not it is appropriate in response to whatever his
10 claim of defense is to make a further application, that in
11 response to that testimony, to put on the evidence of the
12 niece.

13 MS. McLEOD: Your point is well taken. I think we
14 will put in an additional letter just to make sure that we sort
15 of highlighted any key facts that we think are relevant.

16 I'll just leave you with one final point, because I
17 think we've discussed --

18 THE COURT: And then I'll hear briefly from
19 Mr. Brafman.

20 MS. McLEOD: But the final point I would make is that
21 I think it's important for the government and I think it would
22 be part of our case, all of these are of a piece with each
23 other, it's a pattern of conduct. So sort of slicing and
24 dicing them is well, pick one, pick one, pick one, pick two.
25 The point is that this is a course of conduct throughout which

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1 we can show the defendant's knowledge.

2 THE COURT: Two separate transactions aside from this
3 transaction, in the abstract, can do that. Three transactions,
4 other than the charged transaction, can also do that. So the
5 question is, why do you need three instead of two? That's
6 really my issue.

7 MS. McLEOD: We will put in something on that, but
8 hopefully address some of your Honor's concerns.

9 THE COURT: Mr. Brafman, did you want to be heard?

10 MR. BRAFMAN: Just briefly, your Honor. I think the
11 Court is correct, sir, in focusing on the prejudice that comes
12 into the case that the government really doesn't need.

13 And in terms of the lack of probative value of the
14 niece's loan, it happens before any of the other transactions
15 are undertaken. I think it's six months or a year before. It
16 doesn't involve any of the other two coconspirators, Mr. Fried
17 or Mr. Khan, and it's a passbook loan. So the bank would
18 testify that on a passbook loan, because the bank doesn't have
19 any risk, that they would approve this loan whereas the other
20 loans presented somewhat of a risk.

21 I think the overriding concern we have is that in
22 addition to its lack of probative value, it's a 403 issue where
23 the overwhelming prejudice of a defendant, as the government
24 argues, taking advantage of his relatively young niece is
25 really the major concern we have. And I think, Judge, they

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1 really don't need it. Your Honor is correct with respect to
2 the charged transaction in the indictment that involves Fried
3 and Khan with respect to a loan involving Mr. Fried's
4 father-in-law, that obviously involves Mr. Fried. And the
5 third transaction without the niece involves both Fried and
6 Mr. Khan.

7 So I think, Judge, there are a total of three
8 transactions that the government could argue shows intent,
9 shows lack of mistake, and shows everything that they need if
10 the jury believes their witnesses.

11 So they'll write a letter, we'll obviously respond to
12 it, but I think your Honor's initial reaction and initial
13 concern is consistent with the defendant's concern.

14 THE COURT: Why don't you give me a further letter in
15 the next two weeks, and within 10 days after that, you can
16 respond. I'll review that and we can discuss it further on the
17 21st and finally, hopefully by that time, be able to set a firm
18 trial date and be able to, at least on this issue, let me know
19 what the extent of the admissibility of similar act evidence is
20 going to be.

21 Is there anything else then we need to address today?

22 MR. BRAFMAN: No, your Honor.

23 MS. McLEOD: Your Honor, the government would move to
24 exclude time until the conference date of March 21st to allow
25 the parties to continue to prepare for trial.

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1 THE COURT: The defense has consented to the exclusion
2 of time.

3 MR. BRAFMAN: That's correct.

4 THE COURT: So I will exclude time between now and the
5 trial date. We'll either address this further issue and any
6 other issues that might make this trial move more efficiently
7 on the 21st or sometime in advance of whatever trial date that
8 we pick if the 21st is not the appropriate time to do that.
9 I'll see everyone on the 21st at 10 o'clock and I'll wait to
10 hear from you with regard to the proposed trial date.

11 * * *